1940

South East Furniture Company v. The Industrial Commission of Utah operating as the Utah Labor Relations Board : Brief of Defendant

Utah Supreme Court

Joseph Chez; Attorney General of Utah; Zelph S. Calder; Assistant Attorney General; Attorneys for Respondent;

6297

No. 6297

In The Supreme Court of the State of Utah

SOUTH EAST FURNITURE COMPANY,
a Corporation of Utah,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, Operating as The Utah Labor Relations Board,

Defendant.

DEFENDANT'S BRIEF

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DEFENDANT'S BRIEF

STATEMENT

This case concerns the self-organization of labor. The plaintiff corporation is engaged in the sale and manufacture of furniture and other kindred commodities. In round numbers its employees consist of about sixty persons, divided in two substantially equal groups, consisting of

(1) cabinet makers, repairmen, truck drivers, warehouse men, helpers on trucks,

helper linoleum layers, packers, linoleum layer, janitor, finisher, pickers, carpet sewer, shipping clerks, and finisher helpers (hereinafter called factory employees), and

(2) credit manager, assistant credit manager, collection hostess, stenographers, book keepers, cashiers, salesmen, supervisors, foreman, and other employees (hereinafter referred to as white-collar employees), who have the power to "hire and fire."

The factory employees sought to organize for collective bargaining purposes. They sought the services of the Congress of Industrial Organization (hereinafter referred to as the C.I.O.), Local Union No. 1068, to serve as their bargaining agent for the plaintiff with respect to rates of pay, wages, hours of employment, and other conditions of employment. The plaintiff refused to recognize such union as the bargaining agent, because it did not represent all of its white-collar employees. The local union countered, stating in substance that they had no jurisdiction over clerical office help, and that their union does not admit salesmen into their organization.

The 1937 legislature passed what is commonly known as the "Little Wagner Act," or as defined by the

Laws of Utah 1937, Chapter 55, Page 117,

the Labor Relations Act. As pertinent, this Act provides:

"It is hereby declared to be the policy of the State of Utah to eliminate the causes

of certain substantial obstructions to the free operation of industry and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 8 also provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining for their mutual aid or protection."

Section 4 thereof sets up the Industrial Commission as the Labor Relations Board to handle labor disputes, including unfair labor practices (Sec. 9).

What unit of employees shall be the exclusive representative of all the employees?

Section 10 (b):

"The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the em-

ployer unit, craft unit, plant unit, or subdivision thereof."

Section 11 empowers the board with authority to prevent:

(a) Unfair labor practices.

(b) To conduct hearings and issue orders.

(c) To report hearings.

(d) To notify its orders.

(e) To petition the Supreme Court.

(f) For the aggrieved party to petition the Supreme Court.

The plaintiff brings this dispute before this Court under the authority of the last-mentioned Section (f), and as pertinent it reads:

> "*Any person aggrieved by a final order,* (of) the board granting or denying, or denying in whole or in part the relief sought may obtain a review of such order in the Supreme Court of Utah, etc." (Ital. ours).

The Utah Labor Relations Board certified that the C.I.O. was authorized and appointed by a majority of the employees, and ordered the plaintiff to enter into negotiations with the local C.I.O. for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. From such an order plaintiff is attempting to get a review by this Court.

DEFENDANT'S CONTENTION

It is our position that this Court can take no jurisdiction of this controversy because plaintiff is not asking for a review of a "final order" of the board as is contemplated by the statute.

There has been no unfair labor practice filing, and hence no hearing could have been conducted by the board that would result in a final order, decree, or judgment. The mere interlocutory order certifying the collective bargaining agent, and ordering plaintiff to negotiate with them, is only one process in the dispute which may or may not involve the real dispute of any unfair labor practice.

For this Court to concern itself with every minor and incidental ruling of the board as a separate review item, would unduly burden this Court and make for a multiplicity of actions. It would delay, clog, and retard the speedy settlement of labor disputes; therefore, it would be against public policy for this Court to take jurisdiction of this case.

AUTHORITIES

It will be noted that the Utah Labor Relations Act, Chapter 55, page 117, Laws of Utah 1937, was drafted from the National Labor Relations Act, (New) United States Code Annotated 1939, Cumulative Docket Part 29-Labor. The Acts are practically identical except that the Utah Act uses "intra state commerce" instead of "inter-state commerce" and there is a slight variance in the procedure setting up the Labor Relations Board.

In the case of

American Federation of Labor Et al. v. National Labor Relations Board, 308

U. S. 401, decided January 2, 1940, the syllabus reads:

> "A certification by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, that a particular organization of workers in the collective bargaining representative of the employees in a designated unit, is not an order reviewable by the Court of Appeals for the District of Columbia or a circuit court of appeals, under Section 10 (f) of the Act."
>
> "The Act does not provide for court review of such certification except as incidental to review of an order restraining an unfair labor practice."

It will be noted that Section 9 (c) and Section 10 (f), referred to above, are identical with Sections 10 (c) and 11 (f) of the Utah Labor Relations Act, except that in the latter there appears a typographical error, in that at the end of the first line of the Utah Act appears a comma where in the National Act there appears the word "of." The wording respectively is:

> "Any person aggrieved by a final order, the board, etc." and
>
> " Any person aggrieved by a final order of the board, etc."

The foregoing cited A. F. of L. case seems to be on "all fours" with our contention in the instant case. Said A. F. of L. case is:

> "A review of a judgment (by the circuit court of appeals) dismissing for want of jurisdiction a petition to review the certifi-

cation by the National Labor Relations Board of an organization of longshoremen as representative of workers."

The judgment of the United States Supreme Court affirmed the judgment of the said Circuit Court of Appeals.

The said A. F. of L. case cites Federal cases originating in Utah:

Shields v. Utah Idaho Central Railway Co. 305 U.S. 117; and

Utah Fuel Co. v. National Bituminous Coal Com. 306 U. S. 56.

For other authorities see

N.L.R.B. v. Falk Corporation, 308 U.S. 453, 60 Supreme Court 307;

N.L.R.B. v. I.B.E.W. 60 Sup. Ct. 306;

A.F.L. v. N.L.R.B. 60 Sup. Ct. 300.

In conclusion we contend, because of the National and State Labor Relations Acts being the same, that the above cited authorities declare the law in Utah the same as if this Supreme Court had given the opinions.

We respectfully submit, and so move, that plaintiff's petition be dismissed for want of jurisdiction of this Court.

Respectfully submitted,

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Plaintiff's Reply Brief

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Plaintiff's Reply Brief

STATEMENT

The defendant, in its brief, has not attempted to answer any of the points set forth in the plaintiff's brief, and, upon this basis, we assume that defendant's failure to so answer constitutes an admission of the truth of the points set forth in plaintiff's brief.

Defendant's brief deals solely and entirely with its contention that the review herein should be dismissed

for want of jurisdiction of this Court. Our reply brief, therefore, is confined entirely to a rebuttal of the argument made by defendant in support of its single contention.

ARGUMENT

Defendant bases its argument entirely upon the ruling in the case of *American Federation of Labor, et al,* vs. *National Labor Relations Board,* 308 U. S. 401; and defendant contends that this case is on "all fours" with the case at bar. We do not agree with this contention.

An analysis of the steps in the proceeding before the defendant Board, in the instant case, should aid in a clear understanding of the matter. The essential steps are as follows:

July 29, 1940 — The union applied to defendant Board for certification as the bargaining agent for the employes, and, coincidentally, preferred charges against the plaintiff company for alleged discrimination, coercion, and intimidation of the employes.

July 30, 1940 — The defendant Board conducted an informal hearing pursuant to the said communication from the union.

July 31, 1940 — Following a purported investigation, the defendant Board certified the union as the appropriate unit for collective bargaining.

August 2, 1940 — A further informal hearing was held before the defendant Board, for the ostensible purpose of conciliating and mediating the controversy.

August 7, 1940 — The defendant Board served notice upon the plaintiff of a hearing to be held on August 9, 1940, and instructed plaintiff and others to be present.

August 16, 1940 — The defendant Board adopted, by a vote of two to one, Resolution No. 2030, reading in part as follows:

> "BE IT RESOLVED AND ORDERED, that the Utah Labor Relations Board does hereby certify that United Industrial Local Union No. 1068 was authorized and appointed by a majority of the employees engaged and employed in the department hereinbefore found by the Utah Labor Relations Board as the appropriate unit for collective bargaining purposes with the Southeast Furniture Company; therefore, *the Southeast Furniture Company is hereby ordered and directed without further delay to enter into negotiations for the purpose of collective bargaining with said local union with respect to rates of pay, wages, hours of employment, or other conditions of employment.*" (Italics ours)

In the case of *American Federation of Labor vs. National Labor Relations Board,* cited in defendant's brief, upon the request of a rival union, the National Labor Relations Board certified the union as the exclusive bargaining representative of all of the workers in the unit. The Board made no order requiring the employer to bargain with the union, and there was no question of the refusal of the employer to bargain. The petition for review, in fact, was filed by the union against whom the order was made. The court held, in substance, that a mere certification was not a proper matter for review by the court. In its decision, the court traced the legislative history of the National Labor

Relations Act and, among other things, quoted from Senate Report No. 573 of the Committee on Education and Labor, 74th Congress, First Session, page 14, as follows:

> "There is no more reason for court review prior to an election than for court review prior to a hearing. *But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts* in the manner provided in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board." (Italics ours)

The court further quotes the explanation of the Bill on the Senate floor by the Committee chairman, as follows:

> "It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election."

The defendant further cites the case of *National Labor Relations Board vs. International Brotherhood of Electrical Workers,* 60 Supreme Court 306. In this case, two rival unions both claimed a majority. An election was held which was close. The Labor Board ordered a run-off election, for the purpose of determining whether the union receiving the largest number of votes should be the representative, or whether there should be no

representative. The excluded union appealed to the Circuit Court for review, and that court set aside the Board's direction. The case came to the Supreme Court upon certiorari. The latter court merely held that the direction for an election is but a part of the representation proceeding authorized by the Act and is not subject to review. In the said case, there was no affirmative order.

Defendant further cites the case of *National Labor Relations Board vs. Falk Corporation,* 308 U. S. 453, 60 Supreme Court 307. Insofar as this case touches upon the question at bar, the facts are that the Labor Board directed an election under certain conditions. The Board filed a petition with the Circuit Court to enforce its order of election. The Circuit Court modified the order of election and granted a petition for enforcement of it. The Supreme Court, upon review, decided that there can be no court review until the Board issues an order and *requires the employer to do something* predicated upon the result of an election. (Italics ours) This case gives additional credence to our contention that where the Board does order the employer to do something predicated upon certification, the matter is reviewable.

The cases of *Shields vs. Utah Idaho Central Railway Co.,* 305 U. S. 117, and *Utah Fuel Company vs. National Bituminous Coal Com.,* 306 U. S. 56, have no bearing upon the issues of this case whatever.

It may be contended, and correctly so, that in this case, there was no due hearing upon due notice of any alleged unfair labor charge which would form a suitable

basis for an order by the defendant Board, requiring the plaintiff to do the affirmative act, to-wit: "Without further delay to enter into negotiations for the purpose of collective bargaining with said local union with respect to rates of pay, wages, hours of employment, or other conditions of employment." We grant that the defendant Board attempted to "cut across lots," in arriving at its order, and this tendency upon the part of the defendant Board is the very basis for our petition for review. However, regardless of the manner in which the defendant Board arrived at its affirmative order, the order, nevertheless, does, in fact, require the plaintiff to do an affirmative thing, and, if the plaintiff refuses to do so, it lays itself open to the consequences of an application on the part of the defendant Board to this court for affirmative relief. The plaintiff in this proceeding has followed the other alternative of applying to the court for review.

The case of *United Employes Association vs. National Labor Relations Board,* argued in the Circuit Court of Appeals of the Third Circuit, on March 18, 1938, reported in 96 Fed. (2d) 875, presents some good reasoning with respect to the nature of mere certification, as compared to affirmative command. In that case, the Board merely certified the union as the bargaining agent, and the court states in part as follows:

> "It does determine that question which may be reviewed at the proper time by this court, but *that time arrives when the Board orders the company to do something. Here the Union is merely certified* as 'the exclusive representative of all such employes for the purpose of collective

bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.' *This is not a final order. It is in fact not an order at all, but simply the certification of a fact which may be entirely ignored and disregarded by the Association and the Company.* The Company may go on with impunity bargaining with the Association just as though no certification had been made. *Until the Board makes a final order commanding the Company to do something, its jurisdiction is exclusive and complete and its order may not be reversed or set aside if there is any substantial evidence to support it.* Consequently until the Board makes a final order by which some person is aggrieved the proceedings of the Board may not be judicially reviewed or enjoined. * * * If and when the Board by a final order directs the petitioner in this case to cease and desist from any of its practices *or to do anything,* the petitioner may obtain a review of that order by this court which may then examine the regularity of the proceedings by which the Board found that the Union was the exclusive representative of the Association for the purposes of collective bargaining, but until then both the Association and the Company may proceed just as though no election had been held or certification made.'' (Italics ours)

To summarize, we respectfully call the court's attention to the following facts:

The defendant Board originally certified the union as the bargaining agent for the employes in question, under date of July 31, 1940. The defendant Board, on August 16, 1940, merely reaffirmed its previous decision, and affirmatively ordered and directed the plaintiff, without further delay to enter into negotiations for the purpose of collective bargaining with the said union.

While it is granted that this affirmative order of the defendant Board was made without proper hearing, and in the absence of adequate findings and conclusions, nevertheless, unless this court relieves the plaintiff of the effects thereof, through this proceeding, the affirmative order of the said Board is as binding upon this plaintiff as if it had been arrived at after full and complete proceedings, as set forth in the Act.

It is, therefore, our contention that this proceeding is properly before this Court for review at this time, and for the reasons set forth in our original brief, the matter should be remanded to the defendant Board, with instructions to conduct a secret ballot and proceed otherwise as indicated in our said brief.

Respectfully submitted,

ROMNEY & NELSON,
Attorneys for Plaintiff.